FILED
MAR 12 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 756

ESTHER M. KROMER and EDWARD L. KROMER, and STAYON PRODUCTS, INC., AN ILLINOIS CORPORATION,
Petitioners,

vs.

RIEGEL TEXTILE CORPORATION A DELAWARE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on December 5, 1955.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court is unreported, but is found in the printed record at pp. 206-207. The opinion of the Court of Appeals is reported in 227 F. 2d 741, and is found in Appendix, pp. i-vii. The petition for rehearing was denied without opinion (Appendix p. ix).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 5, 1955 (Appendix, p. viii). Rehearing was denied on January 13, 1956 (Appendix, p. ix). The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1) and the petition for certiorari is filed under 28 U. S. C. § 2101 (c) and decisions cited thereunder.

QUESTIONS PRESENTED.

1. Under 35 U. S. C. § 112, where the description part of the application for patent contained an express recital that the triangular portion of the crib sheet may be either separate pieces or an integral part of the blank sheet, may proceedings in the patent office work a file wrapper estoppel on the patentees so as to prevent them from claiming that the triangular portion could be sewed instead of being integral?

2. Where the description part of the application stated squarely and unequivocally that the triangular corners could either be sewed to the sheet or be integral thereto, are not the patentees entitled to the protection of that recital where an alleged infringer claims that the patentees are asking to (a) recapture (b) a claim (c) surrendered (d) by amendment on the basis of the history of the proceedings in the patent office?

3. Where a District Court makes a finding of fact against a party generally on the issue of infringement does not such finding necessarily include a rejection of the defense of file wrapper estoppel?

4. Is a plagiarizer who attempts to differentiate his fitted crib sheet by claiming that his triangular corners were sewed on separately entitled to a defense of file wrapper estoppel where the application expressly and literally recites that it is within the contemplation of the

inventor that the triangular portions may be separate pieces instead of being integral?

5. May a Court of Appeals "infer" what was in the mind of a Patent Office Examiner as opposed to being governed by the actual objective recitals in the record made in the Patent Office?

6. Where specifications, as defined in 35 U. S. C. § 112, contained an express statement that it is immaterial whether the corners were cut from the blank sheet, *i.e.* integral, or were cut separately and thereafter sewed thereto, does the doctrine of file wrapper estoppel prevent the application of the doctrine of equivalents especially where the plagiarizer made a "chinese copy"?

STATUTES INVOLVED.

"The specification shall contain a written *description of the invention*, and of *the manner* and *process* of *making* and *using it*, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall *conclude* with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and *such claim* shall be *construed* to cover the corresponding structure, material, or acts described *in the specification and equivalents thereof.*" (Italics supplied.)

35 U. S. C., Sec. 112, 66 Stat. 798.

This Sec. 112 was enacted in 1952.

STATEMENT.

This litigation involves Esther M. Kromer and Edward L. Kromer patent No. 2,454,463, which issued October 21, 1948, entitled "Baby's Safety Sheet".

Esther and Edward Kromer are man and wife. They became interested in crib sheets in 1943, when their infant daughter, Sherry, was placed in a cast which covered her from her waist down to her ankles (R. 17, 40). Because she was unable to use her legs, the child developed her arms, pulled the straight sheet out from under the mattress, and she became entangled in the sheet (R. 17, 40). After some years of experimenting, research and hard work, the Kromers solved this problem (R. 17, 19; 40, 42).

In the middle of 1946 the Kromers, after working on different designs and patterns, finally completed a fitted crib sheet having triangular corners (R. 19, 42). They brought the models to their patent attorney (R. 19, 20, 42). All of their models had triangular corners. In one of the models the triangular corners were integral with the body of the sheet. In another, the triangular corners were sewed to the sheet (R. 19, 30; 41, 42).

The application for the patent was filed in the Patent Office on October 25, 1946. The history in the Patent Office is shown by Plaintiffs' Exhibit 12 (Appendix pp. x-xxv) (Ex. Vol. p. 16).

A. The Original Application for the Patent.

Plaintiffs' Exhibit 12, Appendix pp. x-xxv, Exhibit Volume pp. 15-28, is the Patent Office File Wrapper.

The description showed that the *basic purpose* of the invention was "a sheet adapted to be so removably attached to a mattress as to defy accidental or undesired removal therefrom. Among the objects of our invention is to pro-

ride a sheet having pockets at all four corners so that he sheet may be anchored to a mattress and thus prevent he user from pulling the sheet away from the mattress." (Appendix p. xii.)

The description then gives the details of the drawings which are described as "a preferred embodiment of the nvention." It is however expressly declared that this mbodiment "is susceptible of modification and change ithout departing from the spirit of our invention."

Nothing is expressly stated in these details of the drawngs as to any corners or any pieces being "integral." With espect to the corners it is stated that "the result is a prodct having four pockets, each having sidewalls and a ottom anchoring portion." (Appendix p. xiv-xv.)

The *use* of the device is described as "by slipping one f the corners around the corner of the mattress. The side alls grip the side walls of the mattress and the bottom nchoring portion lies against the bottom corner portion of he mattress. The other corners are likewise placed in posiion on the mattress." (Appendix p. xiv.)

This description recognizes that for reinforcement "the dges of the pockets may be doubled on themselves and ewed together in the manner."

The description part *concludes* with the express statement that "It is also within the contemplation of our inention that triangular portion 23 instead of being an integral part of blank 11 may be separate pieces sewed toether as heretofore set forth." (Appendix p. xv.)

The specification concluded with the two claims set out erbatim at Appendix p. xv-xvi. The pockets or anchoring ortions were there originally described as "a pair of exensions extending outwardly beyond each of the said end ortions." (Appendix p. xv-xvi.) [The interlineations ritten in longhand are the *subsequent* amendments.]

B. First Office Action by the Examiner.

The first office action by the Examiner is set out verbatim at Appendix p. xix.

The Shauer patent referred to by the Examiner is found at Appendix p. xxv, as Defendant's Exhibit 23. Petitioners suggest that the Examiner's office action was simply a ruling for the record that the question whether the anchoring portion was cut out of the same material as the bed sheet or whether it was attached or sewed on separate from the bed sheet was a matter of choice for the manufacturer, *i. e.*: it was a matter of production, and would not involve invention. Petitioners suggest this is a flat ruling by the Examiner that in his opinion that the question whether or not the anchoring corner was "integral," *i. e.*, cut out of the body of the sheet, was not *then* and could not at any time be considered the basis for granting a patent—that there were other elements which would have to be considered as a basis for the patent.

Petitioners respectfully suggest that there is nothing in the record to show that the Examiner ever changed this objective position. It is further urged that if the Examiner had subsequently granted the patent solely on the ground that the corners were integral, *i. e.*, cut out of the body of the sheet, it would have created a clear conflict in the rulings of the Patent Office.

C. Amendment and Remarks.

It was not until this first office ruling was made that the petitioners' patent attorney added the word "integral" as an amendment (Appendix p. xx). The amendment is there set out verbatim showing the addition of the words.

The *remarks* of the applicants' attorney (Appendix p.

xxi) conclusively show that the basic amendment was *not* dependent upon the method of manufacture; the remarks also show the difference in structure between Shauer and the application: The latter has "corner anchoring portions formed by a pair of spaced triangular extensions on each of the end portions attached to the side portions. Shauer does not show applicants' pair of spaced triangular extensions on the end portions.

Shauer provides narrow portions 13 on the sides and ends bent inwardly to lie immediately beneath the under face of the mattress. This requires that Shauer's mattress covering bed sheet contact the under surface of the mattress throughout the sides and ends. Applicants' BAB'S SAFETY SHEET is more easily positioned because the bottom corner anchoring portions are positioned on and engage the mattress at the corners.

Applicants do not use the reinforcing plastic gussets 17 of Shauer, which is positioned for purposes of elasticity.

Applicants have rephrased the claims to emphasize the pairs of spaced triangular extensions on the end portions providing for the corner anchoring portions, and believe that this construction is an improvement on and different from Shauer.

Applicants earnestly believe they are entitled to the particular protection set forth in the claims as now drawn, and believe they are in allowable condition. An early passing to issue is requested."

Nothing is said in these *remarks* about "integral."

D. Supplemental Amendment.

There followed an oral interview with the examiner (Appendix p. xxii). What took place at the oral interview is not disclosed by the record. The supplemental amendment makes it clear that the amendments pertained to the an-

choring portions, *i. e.*, structure and the function thereof and not to the manufacturing process that would ultimately produce these anchoring portions.

"In further response to office action of April 19, 1948, and subsequent to an oral interview courteously granted by the Examiner, applicant amends as follows:

Please cancel claim 1.

In claim 2, line 6 after "portions" add in *prolongation of the side edges of said end portions.*

In line 7 cancel "curved wall" and insert *rectangular corner.*

In line 9 before "bottom" insert *box like* and after "bottom" cancel "corner" and cancel "wallportion" and insert *rectangular corner.* So that line 9 reads as follows: *side portions forming box like bottom anchoring portions, said rectangular corner portions.*

In line 10 before "each ring" insert *box like.*

Remarks.

Applicant's amendments to claim 2 as set forth in this and the previous amendment, more definitely set forth applicant's invention as distinguished from the prior art.

An earnest effort has been made to place the application in condition for allowance. An early passing to issue is requested." (Appendix p. xxii.)

The patent was granted Oct. 21, 1948 after the filing of this Supplemental Amendment.

Commercial Success.

Petitioners' product has enjoyed commercial success (R. 21, 44, 47). Their fitted crib sheet is sold nationally in the United States (R. 21, 44), in many famous stores (R. 21, 43).

Petitioners' fitted crib sheet has been extensively adver-

tised (R. 44, 45, 51, 111; PX. 2-7, 10, 11; X Vol. 5-14, 40-44). Stores have advertised it in their trade publications (R. 46, 51; PX. 11, 13, 14, X Vol. 14, 40-44). There have been frequent radio broadcasts (R. 46; PX 10). Brochures have been sent out (R. 46, 51; PX. 14, 15, 16; X Vol. 40-44). Advertisements have appeared in metropolitan newspapers, such as Chicago, Philadelphia, Honolulu, Milwaukee, New York and many other cities (R. 45, 52; PX. 17). Over $100,000.00 in advertising has been expended by the petitioners alone in advertising their product (R. 44).

Petitioners' product has enjoyed the acceptance of the trade and the purchasing public (R. 44). Repeat orders have shown that the early successs of the item is continued and is substantial (R. 45, 47). The commercial success of the Kromers' fitted crib sheet is shown by its sales to date of between 7 and 8 million dollars (R. 44).

Petitioners also granted licenses under its patent in suit. Chicopee Mills, Inc. paid petitioners a small sum (R. 34, 204). Fieldcrest Mills, Division of Marshall Field & Company, entered into a license agreement with petitioners to make an adult sized sheet under plaintiffs' patent (R. 37, 56) and paid petitioner between $30,000.00 and $35,000.00 in royalties thereunder (R. 56).

Respondent's Infringement.

Respondent Copied Petitioners' Fitted Crib Sheet and Infringed Petitioners' Patent as a Calculated Business Risk.

In 1947 when petitioners introduced their product, respondent Riegel Textile Corporation was not engaged in making or selling fitted crib sheets (R. 61, 64). Respondent's infringing product came on the market in 1951 (R. 22, 61, 64).

Before respondent came out with its fitted crib sheet, which is referred to in the testimony as Riegel #2 (PX.

24; R. 80-83), it had an earlier boxed end type of non-infringing sheet called for convenience Riegel #1 (PX. 23, R. 62, 64, 83).

Petitioners' Stayon sheet had been so successful on the market that Riegel #1 sheet could not compete, respondent concluded it had to infringe or find itself "behind the eight ball" as expressed in its inter-office communication (PX. 29; X Vol. 57, 58; R. 107). Respondent not only knew of plaintiffs' fitted crib sheet being on the market (R. 62), but knew that it was patented (R. 69, 70).

Mr. Schultheiss' letter dated June 14, 1951, shows that respondent had been making the wasteful, unprofitable boxed end Riegel sheet #1 (PX. 23) because of petitioners' patent. This letter (PX. 27) states:

> "We use considerably more cloth than is necessary by making the pocket type which, up until now, we have adhered to because of the existing patent on the gusset type." (R. 85; X. Vol. 55.)

Mr. Schultheiss, respondent's merchandise manager in charge of new items (R. 59-61), showed petitioner's patented sheet to Donald K. Evans, respondent's treasurer (R. 71, 84, 95, 96). Mr. Evans knew about petitioner's patent because of the patent marking on petitioners' package, and so testified (R. 71, 95, 96). Mr. Schultheiss and Mr. Evans were callous about petitioners' patent and looked at patent infringement, not as a legal or moral wrong, but whether or not the respondent could get away with it (R. 84, 96). Respondent produced a letter from Mr. Evans to Mr. Schultheiss in evidence as PX. 25 which states:

> "The probable profit from the manufacture of such sheets was sufficiently large to permit the payment of a reasonable royalty if it should turn out that we were infringing a patent.
>
> "It was therefore our opinion that the risk of pat-

ent infringement was a reasonable one to take and we should proceed with the manufacture of fitted crib sheets." (R. 84; X. Vol 54, 55.)

Respondent did not see anything wrong about infringing petitioners' patent, but coldly considered it a good risk that it would not be held to account (R. 84).

Respondent did not plead in its answer that it had copied petitioners' Stayon fitted crib sheet and infringed petitioners' patent. Respondent pleaded prior art, but it did not use prior art.

Petitioners were required to dig out this information of copying and infringing from respondent's own officials and employees. The story first came to light in petitioners' discovery deposition in New York. Mr. Schultheiss testified he was in charge of new items, including the "adoption and creation of crib sheets" (R. 61, 73), and that it was his decision to copy the Stayon sheet to meet its competition (R. 66). He testified (R. 66):

"Q. Was the Riegel fitted crib sheet No. 2 made after the defendant had purchased Stayon sheets?

"A. Yes.

"Whose personal decision was it to make Riegel crib sheet No. 2?

"A. It was mine."

Mr. Schultheiss had the Stayon sheet at the defendant's office in New York (R. 65, 66). He discussed the matter with Mr. Evans, respondent's treasured (R. 67, 71). Mr. Evans thought that the patent infringement should proceed as a good risk (R. 84). Mr. Schultheiss then instructed Mr. Gray, superintendent of the fabricating department at the respondent's plant at Ware Shoals, South Carolina (R. 69), to copy the Stayon sheet (R. 67, 68). To be sure that Mr. Gray copied the petitioners' sheet exactly, Mr. Schultheiss sent a Stayon crib sheet to him, together with his instruc-

tions (R. 68, 106). The Stayon sheet is stated in Riegel correspondence (PX. 28, 29, 31; X. Vol. 55-59).

Mr. Schultheiss admitted that respondent's infringing sheet Riegel #2 (PX. 24) was identical in construction with petitioners' Stayon sheet, because respondent's sheet was copied from petitioners' sheet (R. 70, 71).

The foregoing facts were confirmed when petitioners took the deposition of Mr. D. J. Gray, the fabricating department superintendent at the respondent's factory in Ware Shoals, South Carolina (R. 99-106).

In June of 1951, Mr. Gray admitted that he received his instructions from Mr. Schultheiss;

> "to make a triangular cornered sheet" (R. 102).

For a model, Mr. Gray admitted that he had plaintiffs' Stayon fitted crib sheet before him, as he made up the pattern for defendant's infringing fitted crib sheet (R. 103). Mr. Gray had received this Stayon sheet from Mr. Schultheiss in New York (R. 104), and still has it on the premises today (R. 103). Mr. Schultheiss referred to the Stayon sheet in his instructions to Mr. Gray in letters in evidence (PX. 28 and 31; R. 106-107).

Mr. Gray's answer to Mr. Schultheiss' assistant, Mr. Hussey (R. 105) of respondent's New York office is in evidence as PX. 29 (R. 107-108). It refers to the Stayon sheets only with such references as:

> "You will receive through the regular channel costs and yardages for making fitted crib sheets same length as Stayon. * * * Crib sheets made as per the Stayon sample has a total yardage of 21.40 * * * let's go all the way, otherwise we will find ourselves, if not now very shortly, behind the eight-ball again." (R. 107, 108.)

Mr. Gray admitted that the infringing Riegel sheet—Riegel #2 which he copied from petitioners' Stayon sheet

is for all practical purposes constructed the same as the Stayon sheet (R. 106).

It was petitioners' triangular gusseted corner and bottom pocket construction that respondent wanted to copy. This is shown by Mr. Schultheiss' letter of June 14, 1951, wherein he called it "the triangular gusset type." (PX. 27; R. 85; X Vol. 55.) Mr. D. J. Gray referred to the Stayon sheet as "made with a triangular gusset." (PX. 28; X Vol. 55; R. 106.) Respondent's witness Mr. May described this type of sheet as having "a gusseted corner" (R. 123), and Mr. Moulton said "there was a triangular gusset at each corner of the sheet." (R. 131.)

Respondent's philosophy in making its Chinese copy of plaintiffs' sheet is frankly disclosed in a letter which Mr. Schultheiss wrote to Mr. Evans. Mr. Schultheiss is the man who made the decision to infringe and Mr. Evans is his superior officer to whom he reported. This letter, in evidence as Plaintiffs' Exhibit 25 (X Vol. 54) states:

> "The probable profit from the manufacture of such sheets was sufficiently large to permit the payment of a reasonable royalty if it should turn out that we were infringing a patent. It was therefore our opinion that the risk of patent infringement was a reasonable one to take and we should proceed with the manufacture of fitted crib sheets."

EVEN AT THE TRIAL WHEN RESPONDENT PURCHASED OTHER COMPETING SHEETS THEY TURNED OUT TO BE OF PETITIONERS' MANUFACTURE.

At the time of the trial two of respondent's witnesses purchased fitted crib sheets on the market. This was done apparently in an effort to show that petitioners had competitors other than respondent. But as a surprise to respondent, most of these sheets purchased and introduced by these witnesses turned out to be of petitioners manufac-

ture. Respondent's Exhibits 30 and 31 were first found to bear petitioners' patent No. 2,454,463 and were made by petitioners for Butler Brothers (R. 156, 157, 203). Petitioners made respondent's Exhibits 32 and 32A for Marshall Field & Co. and respondent's Exhibit 33 for Sears, Roebuck & Co. and respondent's Exhibit 35 for Goldblatt (R. 203). Neither witness knew at the time he was buying these sheets, that they were made by petitioners (R. 158, 163). Even though respondent consciously sought out other competitors, it found that the sheets were the genuine sheets of petitioners' manufacture.

The District Court, after taking testimony, both oral and documentary, after briefs submitted, filed a memorandum opinion followed by findings of fact. These findings were in substance to the effect that the petitioners' patent was valid and was infringed by the respondent (R. 207-209). Among other findings the District Court found that the respondent's own witness admitted that in operation the respondent's sheet and petitioners' sheet were equivalents and were substantially the same in function, operation and result. (R. p. 208.)

The United States Court of Appeals for the 7th Circuit sustained the finding on the validity of the patent, but reversed the finding on the issue of infringement.

FEDERAL JURISDICTION OF COURTS BELOW.

This is a suit for patent infringement. Jurisdiction of the courts below is based on 28 U. S. C. Secs. 1338 and 1400.

REASONS FOR GRANTING THE WRIT.

A.

This case involves novel questions of fundamental importance to the administration of the patent system by both the United States Patent Office on original application and by the federal courts on subsequent litigation.

1. One of such questions is whether the doctrine of equivalency defined by this Court as a general guide in determining infringement in *Graver Tank Co.* v. *Linde Products Co.*, 339 U. S. 605 (1950) (rehearing opinion), is to be *limited* by the language of an *earlier* decision of this Court, *Exhibit Supply Co.* v. *Ace Patents Co.*, 315 U. S. 126, 136 (1942).

2. A second such question is whether a federal court in reviewing a grant of patent by the Patent Office may guess or speculate as to the mental processes of an examiner. The Court of Appeals attempted to "read the mind" of the examiner at the time of the oral interview granted applicant's attorney. The Court should have confined itself to the objective records of the Patent Office. The decision of the Court of Appeals below is in conflict with *Hutzler* v. *Sales Affiliates, Inc.*, 164 F. 2d 260 (C. C. A. 4, 1947). The Court of Appeals for the 4th Circuit rejected an argument by an infringer that the Patent Office examiner was "mistaken in his view," etc. The Court said, "• • • the patentees are not limited by the mental processes, or confined to the precise reasoning of the Examiner" (164 F. 2d at 267).

To sustain the decision of the Court of Appeals would permit federal courts to range uncontrolled in rulings in patent cases depending upon what the particular court interpreted the subjective mental reactions of an examiner

to be. And at the very least asking for and obtaining an oral interview would subject a patent applicant to unrestrained "guesses" as to what occurred at such oral interview.

3. A third question is whether the literal language of 35 U. S. C. Sec. 112 defining application makes it *mandatory* for courts to consider the clear and unequivocal meaning of the *entire* application in determining the scope to be given to a patent grant. The decision of the Court of Appeals amounts to a rule that notwithstanding the clear and unequivocal language of the application that the triangular corners may be sewed to the blank sheet as well as be cut out of the blank sheet such language may be disregarded and that a court put "blinders" on in construing the language of the claim. This precise question of construing the 1952 legislation has not been expressly passed on by this Court. The law and practice under this recent legislation should be clarified by the decision of this Court.

4. A fourth question is whether the Court of Appeals departed from the general practice of accepting findings of fact by District Courts on issues of infringement. The general finding of the District Court that respondent was guilty of infringement *necessarily* included the "negative" finding of rejection of the defense of file wrapper estoppel. The Court of Appeals erred in treating the record as one where the District Court made no finding on such issue of fact. This Court should exercise its supervisory authority so that reviews by Courts of Appeal will be confined to the proper and well accepted boundaries established by previous decisions.

B.

The decision of the Court of Appeals is in conflict with *Goodyear Tire Co.* v. *Ray-O-Vac*, 321 U. S. 275, 279 (1944). In that case notwithstanding the alleged defense of file wrapper estoppel, this Court considered the commercial success of the product in arriving at the determination of patentability (321 U. S. at 279). In the instant case the Court of Appeals found that commercial success was not relevant to the determination of infringement because of file wrapper estoppel. In the *Goodyear* case this Court adopted and approved the finding that the alleged infringer's substitutions of structure and material "were no more than the choice of mechanical alternatives and did avoid the practice of the principle disclosed by the patent" (321 U. S. at 278). In this case the Court of Appeals did not consider the question. In the *Goodyear* case this Court expressly pointed out "conscious copying" by the alleged infringer (321 U. S. at 278). In the instant case the Court of Appeals did not consider the "conscious copying" as having any relevance.

C.

The unusual facts of conscious and deliberate copying as a calculated business risk should be considered in establishing the legal limits to immoral business piracy.

The "unusual" nature of the facts in this case extend to the climax at the actual trial before the District Court. The respondent's witnesses when sent to purchase fitted crib sheets manufactured by "others" returned to the court room with sheets that on cross-examination turned out to be sheets manufactured by petitioners. The moral unfairness of respondent's conduct should not receive insulation from judicial disapproval simply because such conduct occurred with respect to the law of patents. All

branches of law respond either directly or indirectly to the impact of morals. See "The Moral Element in Supreme Court Decisions," 6 Vanderbilt Law Rev. 41 esp. at 62.

D.

The precise meaning of the word "integral" is the subject of opposing, and in our opinion conflicting, decisions.

In *Clipper Belt Co.* v. *E-W Co.*, 237 F. 602 (1916), the Court of Appeals for the 6th Circuit held that the word "integral" was used in the sense of "operationally or functionally integral."

The word "integral" was held to have the meaning of "single structure" in the case at bar and also in *Michigan Co.* v. *Monarch Co.*, 233 F. 107 (C. A. 6, 1916).

The decisions on this particular issue should be reconciled by this Court. The express reference in the original patent application to the fact that triangular corners may be either sewed on, etc., remained unchanged throughout the entire patent proceeding. We suggest that the decision in *Clipper Belt* v. *E-W Co.*, 237 F. 602, should be preferred in the case at bar.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11445. October Term and Session, 1955.

ESTHER M. KROMER and EDWARD L. KROMER, and STAYON PRODUCTS, INC., an Illinois corporation,
Plaintiffs-Appellees,
vs.
RIEGEL TEXTILE CORPORATION, a Delaware corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 5, 1955.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an action brought to recover damages and profits for unfair competition and for infringement of the single claim of patent No. 2,454,463, issued November 23, 1948, to plaintiffs Esther M. Kromer and her husband, Edward L. Kromer, the subject matter of which was a "Baby's Safety Sheet." Stayon Products, Inc., also a plaintiff, is a licensee of the patentees. Defendant Riegel Textile Corporation denied the charge of unfair competition, asserted invalidity of the patent in view of the prior art and non-infringement based upon file wrapper estoppel.

The District Court, after trial, found the patent valid and infringed but that the proof did not sustain the charge

of unfair competition. Predicated thereon, the court entered its judgment against the defendant on the issue of validity and infringement but in its favor on the charge of unfair competition. Defendant appeals from that portion of the judgment unfavorable to it but there is no appeal by plaintiffs from the portion unfavorable to them.

Thus, the contested issues before this court involve only those relating to validity and infringement. We think the situation as it relates to both issues can best be shown by first considering that of infringement. The patentees in their application stated: "This invention relates to a sheet adapted to be so removably attached to a mattress as to defy accidental or undesired removal therefrom." The object of the invention was stated as follows: "Among the objects of our invention is to provide a sheet having pockets at all four corners so that the sheet may be anchored to a mattress and thus prevent the user from pulling the sheet away from the mattress. This is particularly important for infants because in their twisting, turning and pulling, they tend to pull the sheet away from the mattress, wad it up and become entangled therein, sometimes to their injury and death from strangulation. Our sheet is so constructed as to prevent the baby from so removing the sheet from the mattress."

Construction of the patented sheet was illustrated by drawings accompanying the application. They disclose a single piece of material, a body portion with side portions and end portions, with integral triangular extensions thereof. The drawings disclose that the spaced triangular extensions of the end portions have been folded down and their edges stitched to the upper edges of the opposite side portions, forming what is referred to as pockets on the four corners of the sheet adapted to removably engage a mattress. The patent illustrates and describes in detail, as does the claim in suit, a structure where the

triangular portions which are to form the corner pocket are an integral part of the sheet.

While the drawings disclose a structure where the corner pockets are formed from the triangular portions which are an integral part of the sheet itself, it is pertinent to note that the specifications state: "It is also within the contemplation of our invention that triangular portion 23 instead of being an integral part of blank 11 may be separate pieces sewed together as heretofore set forth."

Thus, the specifications disclose two structures, (1) where the triangular portions are an extension of an integral part of the sheet, and (2) where the triangular portions may be separate pieces sewed together. As noted, the drawings disclose only the first described structure.

Two claims filed with the application were both directed to the structure in its broad aspect. They called merely for "extensions" on the end portions, without specifying whether those extensions were integral with the body of the sheet or were sewn onto it as separate pieces. In the first office action, the Examiner cited four prior art patents, including Shauer No. 2,162,755, and rejected both claims on that reference. In doing so, the Examiner stated: "Claims 1 and 2 are rejected on the patent to Shauer as being fully met thereby. Attention is particularly directed to the triangular gussets in Figs. 4 and 5 of Shauer. Whether such gussets were cut in one piece integral with the bed sheet, or for the purpose of economy of material, or to use a stronger or more elastic material for same would be a matter of choice, and would not involve invention."

The Shauer patent on which the claim stood rejected is for a fitted bed sheet having triangular corner gussets in which the mattress is contained as appears in the patent and drawing. The gussets thus shown are not "integral" with the bed sheet but are of somewhat heavier material and are inserted in the corners of the sheet material.

Thereupon, the applicants filed amended claims 1 and 2. Claim 1 called only for "* * a pair of spaced triangular extensions on said end portions * *." This claim, like the two previous claims which had been rejected, did not specify whether these triangular portions were to be integral with the end portions of the sheet (in other words, cut as part of the body of the sheet), or whether they were to be cut separately and sewn to the body of the sheet. Claim 2, in contrast to claim 1, was amended to read as follows: "A baby's safety sheet comprising a rectangular body portion, a pair of opposite end portions and a pair of opposite side portions, said end portions spaced from said side portions, said side and said end portions both extending outwardly from said body portion for substantially the same distance, *a pair of integral spaced triangular extensions* extending outwardly beyond each of said end portions *in prolongation of the side edges of said end portions*, said side portions attached to adjacent end portions forming rectangular corner portions, said extensions folded inwardly and attached to adjacent side portions forming box like bottom anchoring portions, said rectangular corner portions and said box like anchoring portions forming pockets on the four corners of said sheet adapted to removably engage a mattress, and when in position on said mattress to prevent accidental removal by the baby therefrom." The italicized language represents the amendments made to this claim.

Claim 2 as amended was allowed. Claim 1 as amended was cancelled by the applicants. This action was taken after an oral interview between applicants' attorney and the Examiner. What was said or took place in that interview the record does not disclose. There is a strong inference, however, that the Examiner was persuaded to alter the position previously taken that it was immaterial whether the triangular portions or gussets were cut as an integral portion of the sheet or cut separately and sewn

to the sheet. Otherwise, we discern no explanation for the cancellation of amended claim 1, or for the rejection of original claims 1 and 2, followed by the allowance of amended claim 2, which alone distinguished Shauer, by specifying that the triangular portions should be an integral part of the sheet.

Plaintiffs make much of what appears to be a fact, that the baby sheet manufactured by the corporate plaintiff was widely accepted by consumers and enjoyed great commercial success. The undisputed fact is, however, that plaintiffs have not at any time manufactured or sold a sheet made according to the requirements of the claim. Neither their sheet nor defendant's charged to infringe is made with triangular end portions integral with the sheet. Such portions are by both plaintiffs and defendant cut separately and sewed to the sheet. This is done in the interest of economy; material and labor costs are reduced.

Thus, commercial success becomes insignificant because it was achieved as a result of plaintiffs' commercial sheet and not the sheet described in their claim, and by the same token, plaintiffs' argument that defendant copied their sheet becomes immaterial. The issue of infringement must be appraised by comparing defendant's sheet with that described in the claim rather than by a comparison with plaintiffs' commercial product. It is true, as previously noted, that the specifications suggest that the triangular portions may be cut separately and sewed to the body of the sheet rather than cut so as to form an integral part thereof. The record indicates that the patentees at the time their application was filed had this twofold conception of their invention because they submitted to their attorney drawings illustrative of each conception. The specifications as originally filed were not changed. In the meantime, however, as we have shown, the "separate piece" conception was definitely rejected by the Examiner

over Shauer, which rejection was acquiesced in by the applicants. Plaintiffs now contend that it makes no difference "whether the triangular portions are integral or sewn." Assuming the plausibilty of that statement, the important point is that it did make a difference in the Patent Office; in fact, it represented the difference between rejection of the original claims and the allowance of the claim in suit.

In our view, it is a clear case for the application of the doctrine of file wrapper estoppel, which the District Court did not discuss or refer to. So far as the record discloses, the court in finding infringement compared defendant's sheet with the commercial sheet of plaintiffs rather than with the claim in suit. No good purpose could be served in an extensive discussion of the doctrine of file wrapper estoppel or the citation of the many cases where it has been considered and applied.

This court, in *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 169 F. 2d 645, 648, speaking of file wrapper estoppel, stated:

> "* * a patentee who has changed the form of his claim during its prosecution disclaims the scope of the claim in its earlier form, and the change effected by the amendment must be construed against the patentee. He is not permitted thereafter to recapture what he has disclaimed or assert the claim against any equivalents that would respond to the claim in its earlier form but which do not respond expressly to the claim as issued."

In that case we cited and relied upon *Exhibit Supply Co.* v. *Ace Patents Corporation*, 315 U. S. 126, 136, wherein the court stated:

> "By the amendment, he [the patentee] recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference. [Citing cases.] The difference which he thus disclaimed must be regarded as

material, and since the amendment operates as a disclaimer of that difference it must be strictly construed against him. [Citing cases.]"

It is evident that the claim in suit does not read upon the construction utilized in defendant's sheet; for that matter, it does not read upon the construction embodied in plaintiffs' commercial sheet. In order to hold infringement it would be necessary to ignore an essential element of the claim, the insertion of which enabled plaintiffs to procure its allowance. It would also result in a resurrection of the claims rejected by the Examiner in view of the prior art.

On the issue of validity, a close question is presented. Defendant, in support of its contention that the patent is invalid for lack of invention over the prior art, cites in addition to Shauer a number of prior art patents, including Carswell No. 924,733, and Ellington No. 794,145. Reliance is also placed upon a mattress cover long manufactured and sold by Sears, Roebuck & Company. We think it sufficient to note, without analysis or discussion of the prior art thus relied upon, that we have studied it and are not convinced, in the light of the presumption which attaches to the grant and the finding of validity by the District Court, that the patent is invalid.

The judgment on the issue of validity is affirmed, on the issue of infringement is reversed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois.

Monday, December 5, 1955.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge.

Esther M. Kromer, *et al.*, *Plaintiffs-Appellees*, vs. Riegel Textile Corp., *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 11445

This cause came on to be heard on the transcript of the record from the United States District Court, for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, on the issue of validity, and Reversed on the issue of infringement.

It is further ordered and adjudged by this Court that the costs on this appeal be taxed equally between the Appellant and the Appellees.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois.

Friday, January 13, 1956.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge.

Esther M. Kromer, *et al.*,
Plaintiffs-Appellees,
No. 11445. *vs.*
Riegel Textile Corp.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

PLAINTIFF'S EXHIBIT 12.

(Filed Apr. 7, 1955. Roy H. Johnson, Clerk.)

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This Is To Certify that the annexed is a true copy from the records of this office of the File Wrapper and Contents of Patent 2,454,463, granted November 23, 1948, to Esther M. Kromer and Edward L. Kromer, for Baby's Safety Sheets.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this twenty-first day of May, in the year of our Lord one thousand nine hundred and fifty-four and of the Independence of the United States of America, the one hundred and seventy-eighth.

Robert C. Watson,
Commissioner of Patents.

(Seal)

Attest:
C. G. Rains,
Acting Head, Manuscript and Lithographic Branch.

1946

(Stamp) Patented File Return to Record Room.

Number (Series of 1935) 705604
Div. 8

Patent No. 2454463
Dated Nov. 23, 1948
(Ex'r's Book) 132-1947

Name Esther M. Kromer and Edward L. Kromer, of Chicago,
State of Illinois.
Invention Baby's Safety Sheet.

Original

Application Filed Complete Oct. 25. 1946

Parts Of Application Filed

Petition, Specification, Oath, First Fee $30 1 sheet Drawing, } Oct. 25, 1946

.....
.....
.....

Examined and passed for Issue Oct. 21, 1948. R. O. Lewis, Asst. Exr. Div. 8.

Notice of Allowance Oct. 21, 1948 By Commissioner.

Final Fee $33 Oct. 25/48.

Attorney McKnight & Comstock, 1 N. La Salle St., Chicago 2 Ill.

Associate Attorney .....

No. of Claims Allowed 1. Print Claim ..... in O. G. Class 5-334.

Title as allowed Baby's Safety Sheet.

(In left-hand margin) Division of App. No. ....., filed ....., 19.....

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463 Aug 705604

SPECIFICATION.

Be It Known, that we, Esther M. Kromer and Edward L. Kromer, have invented certain new and useful improvements in

Baby's Safety Sheet

of which the following is a specification.

This invention relates to a sheet adapted to be so removably attached to a mattress as to defy accidental or undesired removal therefrom.

Among the objects of our invention is to provide a sheet having pockets at all four corners so that the sheet may be anchored to a mattress and thus prevent the user from pulling the sheet away from the matress. This is particularly important for infants because in their twisting, turning and pulling, they tend to pull the sheet away from the mattress, wad it up and become entangled therein, sometimes to their injury and death from strangulation. Our sheet is so constructed as to prevent the baby from so removing the sheet from the mattress. Our sheet is always smooth and its desired placement and removal are simple and easy. It is lasting in wear and efficient in operation and has such other objects, advantages and capabilities as will later more fully appear and which are inherently possessed by our invention.

While we have shown in the accompanying drawings a preferred embodiment of our invention, yet it is to be understood that the

same is susceptible of modification and change without departing
from the spirit of our invention.

Referring to the drawings, Fig. 1, is a plan view of a sheet
embodying our invention; Fig. 2 is a detailed enlarged view of one
corner of our sheet, which has been hemmed; Fig. 3 is a detailed
enlarged view of one corner partially sewed; Fig. 4 is a detailed
enlarged bottom view of one corner completely sewed and Fig. 5 is
a perspective view on a reduced scale of our complete sheet.

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2346

The embodiment selected to illustrate our invention comprises
a sheet 10 formed from a blank 11 having a body portion 12, end portions 13 and 14 and side portions 15 and 16 extending beyond body
portion 12. The side portions 15 and 16 end short of end portions
13 and 14 leaving indentations 17 at the corners.

In blank 11, each of the end portions 13 and 14 has a
horizontal center outer edge 18 parallel to horizontal ends 19 of
side portions 15 and 16. Also in blank 11 each of end portions 13
and 14 has opposite longitudinal outer edges 20 parallel to longitudinal edges 21 of side portions 15 and 16.

Each of said longitudinal edges 20 extends outwardly beyond
horizontal edges 18. Extending diagonally inwardly from the outer
extent of each of edges 20, diagonal edges 22 extend to horizontal
edges 18, forming triangular portions 23. The inner extent 24 of

each of the triangular portions 23 is in line with the adjacent
horizontal edge 18.

The distance between each of such lines 24 and the inner end
of the adjacent longitudinal edge 20 provides a length substantially
the same as the width of each horizontal end 19 of side portions 15
and 16.

Taking one corner for illustration, edge 19 is moved into
contact with edge 20 up to line 24 and sewed together.

The triangular portion 23 is bent or folded inwardly on line
24 and the balance of outer edge 20 is sewed to longitudinal edge
21. This forms pocket 25 having side walls 26 and bottom anchoring
portion 27.

Each of the four corners of our construction is similarly
sewed. The result is a product having four pockets 25 each having
side walls 26 and a bottom anchoring portion 27.

In use our device is easily and readily installed by slipping
one of the corners around the corner of the mattress. The side
walls grip the side walls of the mattress and the bottom anchoring
portion lies against the bottom corner portion of the mattress. The
other corners are likewise placed in position on the mattress.

This in effect locks the sheet in position. No twisting or
turning of the child can pull the sheet away from the mattress and

tie up or strangle the child. Our sheet is always smooth and in
place. It can of course be as readily removed and replaced in
position whenever desired.

It is to be noted that for reinforcement, the edges of the
pockets may be doubled on themselves and sewed together in that
manner.

It is also within the contemplation of our invention that
triangular portion 23 instead of being an integral part of blank 11
may be separate pieces sewed together as heretofore set forth.

705604—3

2348

Having thus described ~~my~~ *(OUR) invention, ~~I~~ *(WE) claim:

~~1. A baby's safety sheet comprising a rectangular body
portion, a pair of opposite end portions and a pair of opposite
side portions, said end portions spaced from said portions, a~~
A ~~pair of *(SPACED TRIANGULAR) extensions on said end portions, said end portions attached
to said side portions forming curved side walls and said extensions~~
A ~~attached to said side portions forming bottom *(CORNER) anchoring portions,
said side walls and said anchoring portions forming pockets on the
four corners of said sheet adapted to removably engage a mattress,
and when in position on said mattress to prevent accidental removal
by the baby therefrom.~~

A baby's safety sheet comprising a rectangular body

---

*Matter in parentheses inserted.

portion, a pair of opposite end portions and a pair of opposite
side portions, said end portions spaced from said side portions,
said side and said end portions both extending outwardly from said
A body portion for substantially the same distance, a pair of *(INTEGRAL SPACED TRIANGU-
B LAR) extensions extending outwardly beyond each of said end portions *(IN PROLONGATION OF THE SIDE EDGES OF SAID END PORTIONS) said
A B side portions attached ~~*adjacent*~~ to *(ADJACENT) end portions forming *(RECTANGULAR CORNER) ~~*curved wall*~~
portions, said extensions folded inwardly and attached to adjacent
A B side portions forming *(BOX LIKE) bottom anchoring portions, said *(RECTANGULAR CORNER) ~~*wall*~~ portions
and said *(BOX LIKE) anchoring portions forming pockets on the four corners of
said sheet adapted to removably engage a mattress, and when in
position on said mattress to prevent accidental removal by the
baby therefrom.

705604—4

19-30A 2350

(5/31/44) Joint

OATH, POWER OF ATTORNEY, AND PETITION.

Being duly sworn, we, Esther M. Kromer and Edward L. Kromer, depose and say that we are respectively a citizen of United States of America, residing at Chicago, Illinois, and a citizen of United States of America, residing at Chicago, Illinois, that we have read the foregoing specification and claims and we verily believe we are the original, first, and joint inventors of the invention or discovery in Baby's Safety Sheet, described and claimed therein; that

* Matter in parentheses inserted.

we do not know and do not believe that this invention was ever known or used before our invention or discovery thereof, or patented or described in any printed publication in any country before our invention or discovery thereof, or more than one year prior to this application, or in public use or on sale in the United States for more than one year prior to this application; that this invention or discovery has not been patented in any country foreign to the United States on an application filed by us or our legal representatives or assigns more than twelve months before this application; and that no application for patent on this invention or discovery has been filed by us or our representatives or assigns in any country foreign to the United States, except as follows:

And we hereby appoint McKnight and Comstock, a firm composed of James R. McKnight and Robert C. Comstock, 1 N. La Salle St., Chicago 2, Illinois, Registration No. 15,264, our attorneys or agents with full power of substitution and revocation, to prosecute this application and to transact all business in the Patent Office connected therewith.

Wherefore we pray that Letters Patent be granted to us for the invention or discovery described and claimed in the foregoing specification and claims, and we hereby subscribe our names to the foregoing specifications and claims, oath, power of attorney, and this petition, this 22nd day of October, 1946.

Inventor Esther M. Kromer.
First Middle Last
name initial name

Post Office Address
750 Bittersweet Place
Chicago, Illinois

Inventor Edward L. Kromer.
First Middle Last
name initial name

Post Office Address
750 Bittersweet Place
Chicago, Illinois

State of Illinois, } ss.
County of Cook. }

Before me personally appeared Esther M. Kromer and Edward L. Kromer, to me known to be the persons described in the above application for patent, who signed the foregoing instrument in my presence, and made oath before me to the allegations set forth therein as being under oath, on the day and year aforesaid.

Charles Hansen,
Notary Public.

(Seal)

This form may be executed only when attached to a complete application as the last page thereof.

Approved Single Signature Form
Joint Inventors

705604—5

5 — 354

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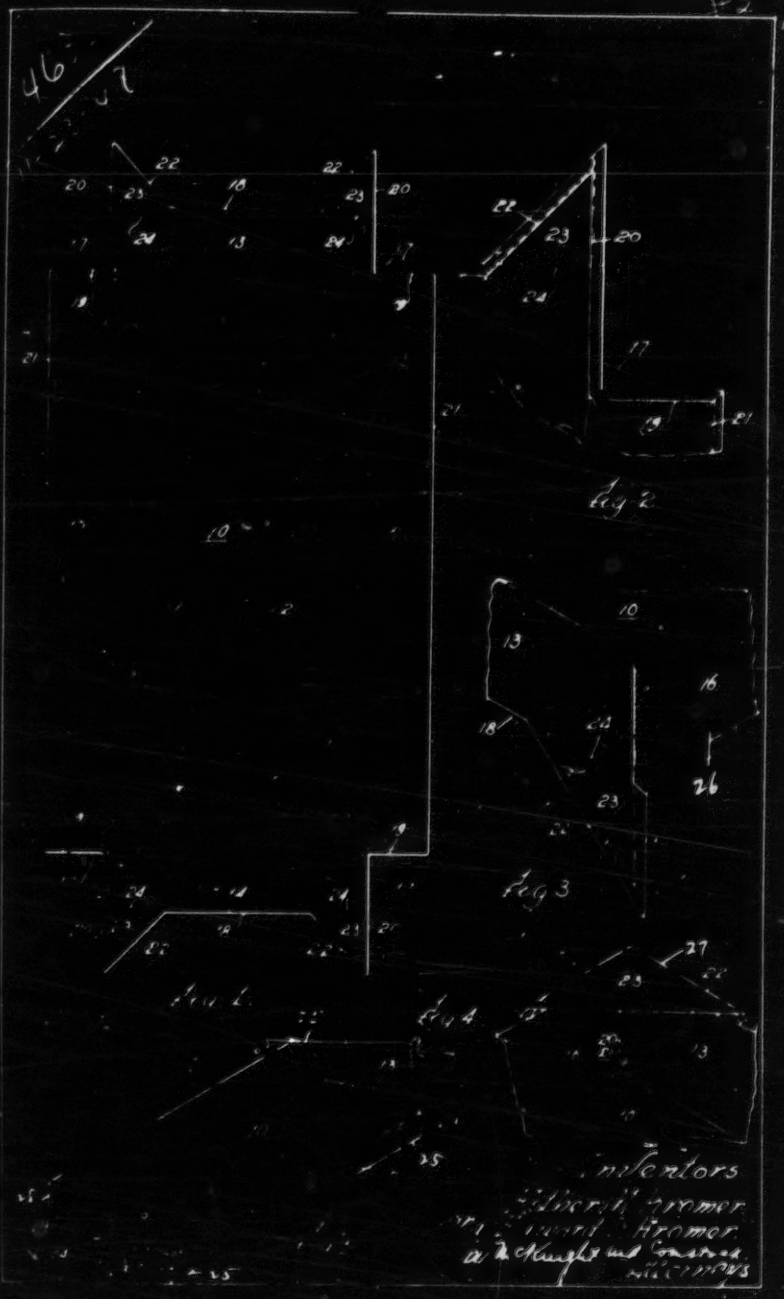

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Friedmann/prg

Paper No. 3

Address only The Commissioner of Patents, Washington, D. C.

All communications respecting this application should give the serial number, date of filing and name of the applicant.

DEPARTMENT OF COMMERCE

United States Patent Office

Washington

Please find below a communication from the Examiner in charge of this application.

Lawrence C. Kingsland,
Commissioner of Patents.

Division 8

Applicant: Esther M. Kromer, et al.
Ser. No. 705,604
Filed Oct. 25, 1946
For Baby's Safety Sheet

McKnight & Comstock
1 N. La Salle St.,
Chicago 2, Ill.

This application has been examined.

References made of record:

			5-354 AR JD
Grattan	738,674	Sept. 8, 1903	~~155/182~~
Carswell	924,733	June 15, 1909	5-334
Shauer	2,162,755	June 20, 1939	5-354
Clarke	2,214,074	Sept. 10, 1940	5-354

Claims 1 and 2 are rejected on the patent to Shauer as being fully met thereby. Attention is particularly directed to the triangular gussets in Figs. 4 and 5 of Shauer. Whether such gussets were cut in one piece integral with the bed sheet, or for the purpose of economy of material, or to use a stronger or more elastic material for same

would be a matter of choice, and would not involve invention.

On allowance of any claim, revision as to form may be required. (Order 5267, Oct. 14, 1947.)

L. C. F.
by RB

Alden E. Dimus,
Examiner.

(Stamp) U. S. Patent Office Apr 19 1948 Mailed.

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4/A

IN THE UNITED STATES PATENT OFFICE

(Stamps) Mail Division Nov 12 1946 U. S. Patent Office. Patent Office May 14 1948 Division 8.

AG

AG

In re application of:
Esther M. Kromer, et al.

Serial No. 705,604

Baby's Safety Sheet

Filed October 25, 1946

Division 8

AMENDMENT

In response to Office Acition of April 19, 1948, applicants amend as follows:

In claim 1, line 4, before "extensions" insert spaced triangular.

In claim 1, line 6, after "bottom" insert corner.

In claim 2, line 5, after "of" add integral spaced triangular.

In claim 2, line 7, cancel "adjacent" and after "to" insert adjacent.

In claim 2, line 9, after "bottom" insert corner.

REMARKS

Applicants have carefully studied the remarks of the Examiner and the patent to Shauer No. 2,162,755, and believe that the claims as now amended are allowable for the following reasons:

Applicant's Baby's Safety Sheet has corner anchoring portions formed by a pair of spaced triangular extensions on each of the end portions attached to the side portions. Shauer does not show applicants' pair of spaced triangular extensions on the end portions.

Shauer provides narrow portions 13 on the sides and ends bent inwardly to lie immediately beneath the under face of the mattress. This requires that Shauer's mattress covering bed sheet contact the under surface of the mattress throughout the sides and ends. Applicant's Baby's Safety Sheet is more easily positioned because the bottom corner

anchoring portions are positioned on and engage the mattress at the corners.

Applicants do not use the reinforcing elastic gusset 17 of Shauer, which is positioned for purpose of elasticity.

Applicants have rephrased the claims to emphasize the pairs of spaced triangular extensions on the end portions providing for the corner anchoring portions, and believe that this construction is an improvement on and different from Shauer.

Applicants earnestly believe they are entitled to the particular protection set forth in the claims as now drawn, and believe they are in allowable condition. An early passing to issue is requested.

Respectfully submitted,

McKnight and Comstock.

D Fried 5/lup B
5-12-48

IN THE UNITED STATES PATENT OFFICE

(Stamps) Mail Division Oct 11 1948 U. S. Patent Office. Office Oct 13, 1948 Division 8.

In re application of:
Esther M. Kromer, et al.
Serial No. 705,604 Baby's Safety Sheet
Filed October 25, 1946
Div. 8—Room 7001C

AG AG

SUPPLEMENTAL AMENDMENT

In further response to Office Action of April 19, 1948 and subsequent to an oral interview courteously granted by the Examiner, applicant amends as follows:

Please cancel claim 1.

In claim 2, line 6 after "portions" add in prolongation of the side edges of said end portions.

In line 7 cancel "curved wall" and insert rectangular corner.

In line 9 before "bottom" insert box like and after "bottom" cancel "corner" and cancel "wall ~~portions~~" and insert rectangular corner so that line 9 reads as follows: side portions forming box like bottom anchoring portions, said rectangular corner portions.

In line 10 before "anchoring" insert box like.

REMARKS

Applicant's amendments to claim 2 as set forth in this and the previous amendment, more definitely set forth applicant's invention as distinguished from the prior art.

An earnest effort has been made to place the application in condition for allowance. An early passing to issue is requested.

Respectfully submitted,
McKnight and Comstock.

R 705604—10

Address Only
The Commissioner of Patents
Washington 25, D. C.
Div. 8
Rm. 7001C

Serial No. 705,604

DEPARTMENT OF COMMERCE
United States Patent Office
Washington

Daleda/prg

October twenty first, 1948

Esther M. Kromer and Edward L. Kromer.

Your Application for a patent for an Improvement in Baby's Safety Sheet filed Oct. 25, 1946, has been examined and Allowed with 1 claim.

The final fee, Thirty Dollars ($30), With One Dollar ($1) Additional For Each Claim Allowed In Excess Of 20 (no less sum can be accepted), must be paid not later than 6 Months from the date of this present notice of allowance. If the final fee to be not paid within that period, the patent will be withheld; See Revised Statutes, Section 4885 As Amended By Act Of Congress Approved August 9, 1939.

The office delivers patents upon the day of their date, on which date their term begins to run. The preparation of the patent for final signing and sealing will require about 4 weeks, and such work will not be begun until after payment of the necessary final fee.

When the final fee is paid, there should also be sent, Distinctly And Plainly Written, the name of the Inventor, Title Of The Invention, And Serial Number As Above Given, Date of Allowance (which is the date of this circular), Date Of Filing, and, if assigned, the Names Of The Assignees.

If it is desired to have the patent issue to an Assignee Or Assignees, an assignment containing a Request to that

effect, together with the Fee for recording the same, must be filed in this office on or before the date of payment of the final fee.

The final fee will Not be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Very truly yours,

Lawrence C. Kingsland,
Commissioner of Patents.

McKnight & Comstock
1 N. La Salle St.,
Chicago 2, Ill.

(Stamp) U. S. Patent Office Oct 21 1948 Mailed.
Uncertified Checks Will Not Be Accepted

R 705604—11

PO—98 Ser. No. 705604 2349
2-13-47 Paper No. 6

REFERENCES CITED

The following references are of record in the ~~*patented*~~ file of this patent:

UNITED STATES PATENTS

Name	Number	Date
Grattan	738,674	Sept. 8, 1903
Carswell	924,733	June 15, 1909
Shauer	2,162,755	June 20, 1939
Clarke	2,214,074	Sept. 10, 1940

FOREIGN PATENTS

County	Number	Date

OTHER REFERENCES

705604—12

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FINAL FEE PAID TO THE COMMISSIONER OF PATENTS

(Stamp) Mail Division Oct 25 1948 U. S. Patent Office

(Be careful to give correct Serial No.)

Serial No. 705,604

Inventor: Esther M. Kromer and Edward L. Kromer

Patent to be Issued to: Esther M. Kromer and Edward L. Kromer

Name of Invention, as Allowed: Baby's Safety Sheet

Date of Payment: October 23, 1948

Fee: $30.00 ch

Date of Filing: October 25, 1946

Date of Circular of Allowance: October 21, 1948

The Commissioner of Patents will please apply the accompanying fee as indicated above.

McKnight and Comstock,
Attorneys.

Send Patent to: McKnight and Comstock, One North La Salle Street, Chicago 2, Illinois

Final fees will not be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office, Nor Will They Be Applied In Pending Applications.

R

705604—13

Nov. 23, 1948. E. M. KROMER ET AL 2,454,463

BABY'S SAFETY SHEET

Filed Oct. 25, 1946

Fig. 1.

Fig. 2.

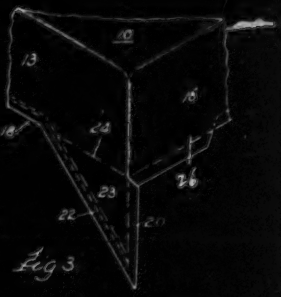

Fig. 3.

Fig. 4.

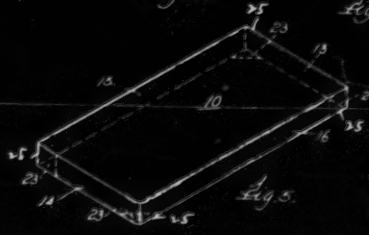

Fig. 5.

Inventors
Esther M. Kromer
and Edward L. Kromer
by Dewey & Dewey
Attorneys

POOR COPY

Patented Nov. 23, 1948

2,454,463

UNITED STATES PATENT OFFICE

2,454,463

BABY'S SAFETY SHEET

Esther M. Kromer and Edward L. Kromer, Chicago, Ill.

Application October 25, 1946, Serial No. 705,604

1 Claim. (Cl. 5—334)

1

This invention relates to a sheet adapted to be so removably attached to a mattress as to defy accidental or undesired removal therefrom.

Among the objects of our invention is to provide a sheet having pockets at all four corners so that the sheet may be anchored to a mattress and thus prevent the user from pulling the sheet away from the mattress. This is particularly important for infants because in their kicking, turning and pulling, they tend to pull the sheet away from the mattress, wad it up and become entangled therein, sometimes to their injury and death from strangulation. Our sheet is so constructed as to prevent the baby from so removing the sheet from the mattress. Our sheet is always smooth and its desired placement and removal are simple and easy. It is lasting in wear and efficient in operation and has such other objects, advantages and capabilities as will later more fully appear and which are inherently possessed by our invention.

While we have shown in the accompanying drawings a preferred embodiment of our invention, yet it is to be understood that the same is susceptible of modification and change without departing from the spirit of our invention.

Referring to the drawings, Fig. 1, is a plan view of a sheet embodying our invention; Fig. 2 is a detailed enlarged view of one corner of our sheet, which has been hemmed; Fig. 3 is a detailed enlarged view of one corner partially sewed; Fig. 4 is a detailed enlarged bottom view of one corner completely sewed and Fig. 5 is a perspective view on a reduced scale of our complete sheet.

The embodiment selected to illustrate our invention comprises a sheet 10 formed from a blank 11 having a body portion 12, end portions 13 and 14 and side portions 15 and 16 extending beyond body portion 12. The side portions 15 and 16 end short of end portions 13 and 14 leaving indentations 17 at the corners.

In blank 11, each of the end portions 13 and 14 has a horizontal center outer edge 18 parallel to horizontal ends 19 of side portions 15 and 16. Also in blank 11 each of end portions 13 and 14 has opposite longitudinal outer edges 20 parallel to longitudinal edges 21 of side portions 15 and 16.

Each of said longitudinal edges 20 extends outwardly beyond horizontal edges 18. Extending diagonally inwardly from the outer extent of each of edges 20 diagonal edges 22 extend to horizontal edges 18 forming triangular portions 23. The inner extent 24 of each of the triangular

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portions 23 is in line with the adjacent horizontal edge 18.

The distance between each of such lines 24 and the inner end of the adjacent longitudinal edge 25 provides a length substantially the same as the width of each horizontal end 19 of side portions 15 and 16.

Taking one corner for illustration, edge 18 is moved into contact with edge 20 on to line 24 and sewed together.

The triangular portion 23 is bent or folded inwardly on line 24 and the balance of outer edge 20 is sewed to longitudinal edge 21. This forms pocket 25 having side walls 26 and bottom anchoring portion 27.

Each of the four corners of our construction is similarly sewed. The result is a product having four pockets 25 each having side walls 26 and a bottom anchoring portion 27.

In use our device is easily and readily installed by slipping one of the corners around the corner of the mattress. The side walls grip the side walls of the mattress and the bottom anchoring portion lies against the bottom corner portion of the mattress. The other corners are likewise placed in position on the mattress.

This in effect locks the sheet in position. No twisting or turning of the child can pull the sheet away from the mattress and tie up or strangle the child. Our sheet is always smooth and in place. It can of course be as readily removed and replaced in position whenever desired.

It is to be noted that for reinforcement, the edges of the pockets may be doubled on themselves and sewed together in that manner.

It is also within the contemplation of our invention that triangular portion 23 instead of being an integral part of blank 11 may be separate pieces sewed together as hereinbefore set forth.

Having thus described our invention, we claim:

A baby's safety sheet comprising a rectangular body portion, a pair of opposite end portions and a pair of opposite side portions, said end portions spaced from said side portions, said side and said end portions both extending outwardly from said body portion for substantially the same distance, a pair of integral spaced triangular extensions extending outwardly beyond each of said end portions in prolongation of the side edges of said end portions, said side portions attached to adjacent end portions forming rectangular corner portions, said extensions folded inwardly and attached to adjacent side portions forming box like bottom anchoring portions, said

rectangular corner portions and said box like anchoring portions forming pockets on the four corners of said sheet adapted to removably engage a mattress, and when in position on said mattress to prevent accidental removal by the baby therefrom.

ESTHER M. KROMER.
EDWARD L. KROMER.

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The following references are of record in the file of this patent:

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Number	Name	Date
738,674	Grattan	Sept. 8, 1903
924,733	Carswell	June 15, 1909
2,162,755	Shauer	June 20, 1939
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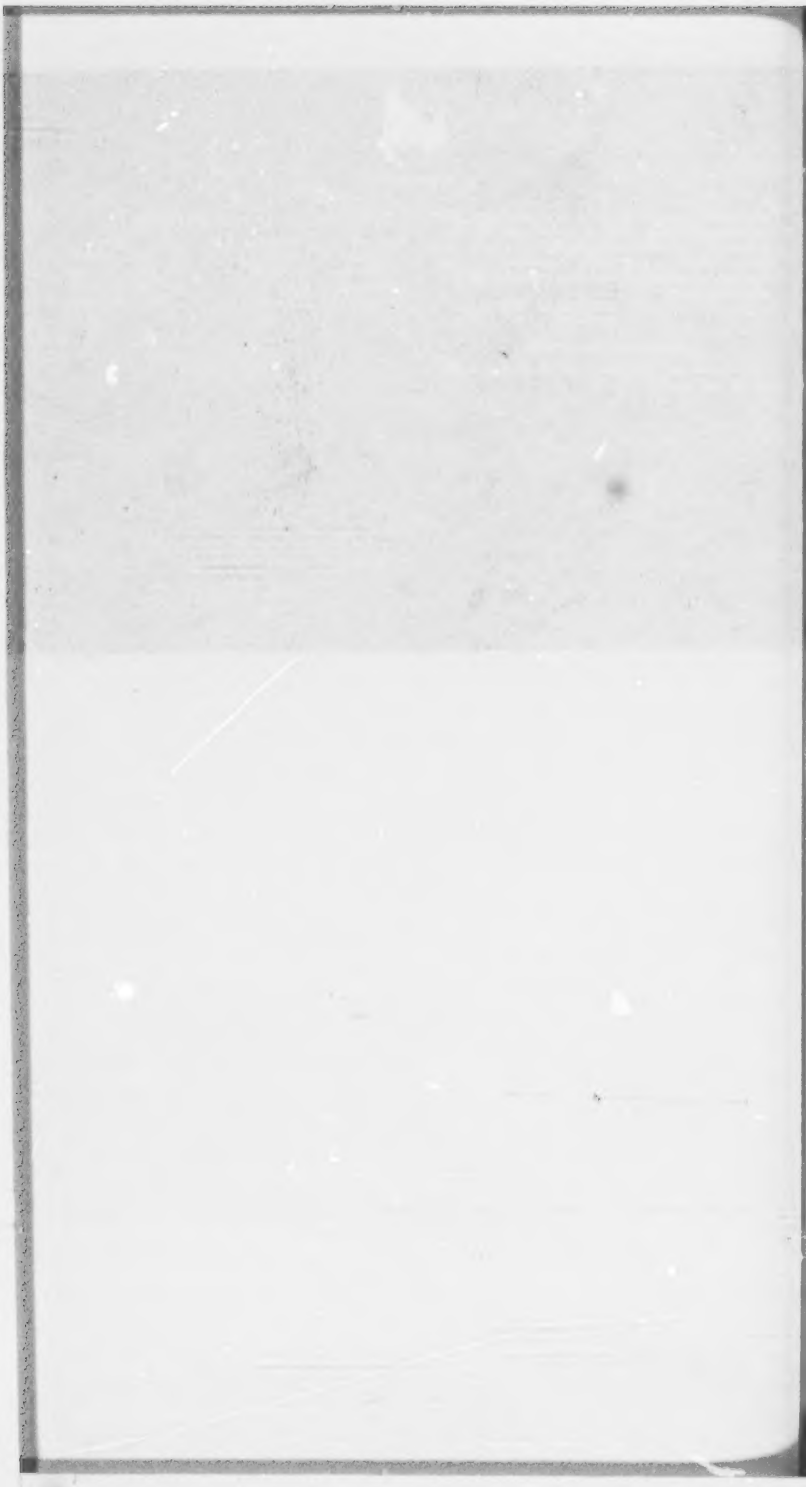


Defendant's Exhibit 23

Plaintiffs Exhibit — Defendants Exhibit 23 (U) Iden. Rec'd.

In the District Court of the United States, Northern District of Illinois, Eastern Division — BEFORE LA BUY, J.

No.

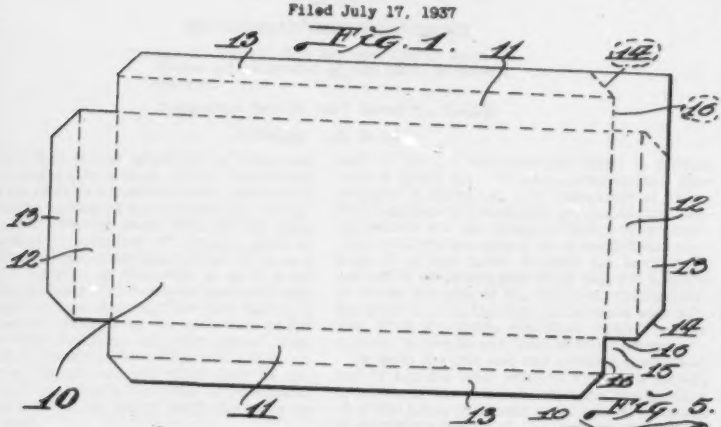
Marjorie M. Ryan • Official Court Reporter

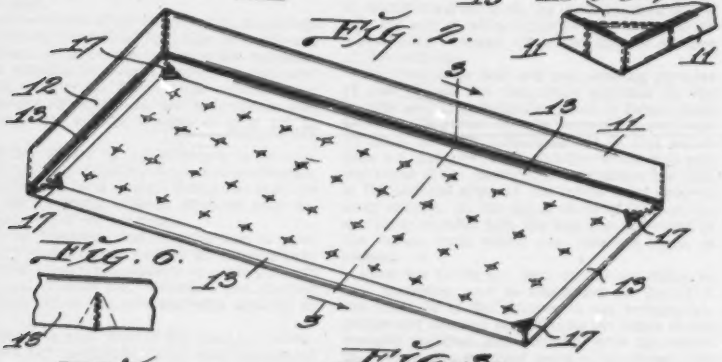
June 20, 1939. L. S. SHAUER 2,162,755

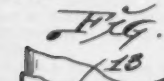
MATTRESS COVERING BED SHEET

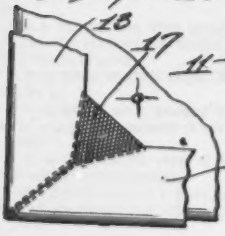
Filed July 17, 1937

5 JC 84









INVENTOR.
LOUIS S. SHAUER.
BY Walter P. Smith ATTY.

Patented June 20, 1939 2,162,755

UNITED STATES PATENT OFFICE

2,162,755

MATTRESS COVERING BED SHEET

Louis S. Shaner, Los Angeles, Calif.; Leon S. Shaner administrator of said Louis S. Shaner, deceased

Application July 17, 1937, Serial No. 154,349

2 Claims. (Cl. 5—254)

My invention relates generally to beds, and more particularly to a sheet that is constructed so as to function as a mattress cover, and one of the principal objects of my invention is, to construct a bed-covering sheet wherein the main body portion is composed of a single piece of fabric cut to proper shape and having its corners united by stitching or otherwise, so as to form depending portions that overlie the sides and ends of a mattress and also portions that extend a short distance inwardly on the under side of the mattress from the sides and ends thereof, thus providing a covering sheet that will retain its position on the mattress, and which sheet, in use, will not pull and wrinkle as a result of movements of the occupant of the bed of which the mattress forms a part.

A further object of my invention is, to provide a mattress-covering sheet that may be easily and quickly applied to or removed from the mattress, thereby effecting a material saving of time and labor in making up beds, which consideration is especially important in hotels, hospitals and the like, where a large number of beds are in use.

A further object of my invention is, to construct a mattress-covering sheet, and particularly the sides, ends and corners thereof, so that the latter will fit neatly without wrinkles over the sides and ends of the mattress.

With the foregoing and other objects in view, my invention consists in certain novel features of construction and arrangements of parts that will be hereinafter more fully described and claimed and illustrated in the accompanying drawing in which:

Figure 1 is a plan view of the mattress-covering sheet, cut to proper shape and illustrating the same as it appears before the corner edges are sewn together to form the side and end covering portions.

Figure 2 is a perspective view looking against the under side of a mattress to which one of my improved sheets is applied.

Figure 3 is a cross section taken on the line 3—3 of Figure 2.

Figure 4 is a detail view looking against the under side of one of the corners of the mattress-covering sheet.

Figure 5 is a perspective view of a modified form of the corner construction.

Figure 6 is a detail view of a modified form of that portion of the sheet that underlies the mattress.

As illustrated in Figure 1, the main body portion of the mattress-covering sheet is formed from a single piece of fabric, substantially rectangular in shape and this single piece of material comprises a rectangular portion 10 that corresponds in size and shape to the top of the mattress to which the sheet is to be applied and portions 11 of the fabric forming the main body portion 10 constitute side strips that are adapted to overlie the sides of the mattress. Corresponding portions 12 at the ends of the main body portion 10 of the fabric constitute strips that are adapted to overlie end faces of the mattress.

Between the side and end covering portions 11 and 12 and the outer edges of the fabric utilized in producing the mattress cover, narrow portions 13 of the fabric constitute strips that are adapted to extend inwardly from the lower portions of the side and end covering strips 11 and 12 and to lie immediately beneath the under face or surface of the mattress.

To produce the side and end covering portions 11 and 12 and the underlying portions 13, the corners of the rectangular piece of fabric from which the covering sheet is formed are cut away on diagonal lines designated by 14, and which lines are disposed at 45° relative to the side and end edges of the sheet and intermediate the ends of the inclined edges 14, the fabric is cut away to form notches 15, the edges 16 of which are respectively parallel with the side and end edges of the fabric from which the covering sheet is formed.

After the fabric has been cut to the shape as just described, and as illustrated in Figure 1, the edges 16 of the notches 15 are brought together and stitched and likewise the edges 14 are brought together and stitched, with the result that when the covering sheet is completed, the portions 11 and 12 overlie respectively the sides and ends of the mattress and the portions 13 underlie those portions of the mattress immediately adjacent the side and end faces thereof.

In order to strengthen the corners between the underlying portions 13 of the cover, substantially triangular gussets 17, of material somewhat heavier than the material from which the sheet is formed, are inserted in the corners between the inner edges of the underlying strip portions 13 and to accommodate a certain amount of pulling strains without tearing, these gussets 17 may be formed from elastic material, knitted fabric or the like. (See Fig. 4.) In some instances, it may be found desirable to produce the mattress cover without the gussets 17.

Instead of forming the main body portion of

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the sheet from a single piece of material, my invention contemplates the construction of a covering sheet having separately formed corner portions that are suitably secured to the corners of the main body of the sheet, as illustrated in Fig. 5; and further, the members 13 that underlie the mattress may be connected with lacings or with longitudinally or transversely disposed straps.

In order to take up any slack that might develop in the underlying portions 13 of the cover, substantially V-shaped portions may be cut from the intermediate portions of said underlying members and the edges of the material at the sides of the cut-away portions brought together and stitched so as to cause the underlying portions to lie practically flat against the under side of the mattress. (See Fig. 6.)

Further, the covering member constructed in accordance with my invention may be utilized as a cover for cots, day beds, surgical tables, pallets and the like, and also as a cover for benches, tables and other pieces of furniture.

A sheet of my improved construction may be easily and quickly applied to or removed from a mattress, and when properly positioned thereupon, the sides and ends fit neatly over the side and end faces of the mattress and the main body portion 18 of the sheet is maintained in smooth condition on the upper surface of the mattress.

Inasmuch as the main body portion of my improved mattress-covering sheet is formed from a single piece of fabric, a material saving of time, labor and consequent expense in the manufacture of the covering sheets is effected.

Thus it will be seen that I have provided a mattress-covering sheet that is relatively simple in construction, inexpensive of manufacture and very effective in performing the functions for which it is intended.

It will be understood that minor changes in the size, form and construction of the various parts of my improved mattress-covering sheet may be made and substituted for those herein shown and described without departing from the spirit of my invention, the scope of which is set forth in the appended claims.

I claim as my invention:

1. As a new article of manufacture, a mattress covering sheet, comprising an inverted box-like member having a closed top for covering the upper surface of a mattress, depending end and side walls to cover the sides and ends of said mattress and inwardly directed extensions of the elongated free edges of said end and side walls underlying marginal portions of the bottom of said mattress, said extensions being trapezoidal in plan, adjacent ends of said extensions being connected to provide a continuous rectangular flange, and a resilient reinforcing gusset at each corner of said flange, straight edge portions of said gussets extending across said corners inwardly thereof.

2. As a new article of manufacture, a mattress covering sheet, comprising an inverted box-like member having a closed top for covering the upper surface of a mattress, depending end and side walls to cover the sides and ends of said mattress and inwardly directed extensions of the elongated free edges of said end and side walls underlying marginal portions of the bottom of said mattress, said extensions being trapezoidal in plan, adjacent ends of said extensions being connected to provide a continuous rectangular flange, and a resilient triangular reinforcing gusset at each corner of said flange, the bases of said gussets extending across said corners inwardly thereof.

LOUIS S. SHAUER.

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FILED
MAR 15 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 756.

ESTHER M. KROMER and EDWARD L. KROMER and STAYON PRODUCTS, INC., an Illinois Corporation,

Petitioners,

v.

RIEGEL TEXTILE CORPORATION, a Delaware Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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CITATIONS.

Dixie Cup Co. v. *Paper Container Mfg. Co.*, 169 F. 2d 645, 648 (CA 7)	2
Exhibit Supply Co. v. *Ace Patents Corp.*, 315 U. S. 126, 136	2

IN THE

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No. 756.

ESTHER M. KROMER and EDWARD L. KROMER and STAYON PRODUCTS, INC., an Illinois Corporation,

Petitioners,

vs.

RIEGEL TEXTILE CORPORATION, a Delaware Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

This action was brought to recover damages and profits for alleged infringement of the Kromer *et al.* patent No. 2,454,463, dated November 23, 1948 for "Baby Safety Sheet" and for alleged unfair competition (copying of petitioners' commercial sheet). Judgment of the Trial Court dismissed the unfair competition count for want of equity but adjudged the patent valid and infringed and ordered an injunction and accounting for damages. Respondent appealed from that portion of the judgment dealing with the patent. Petitioners did not appeal from the dismissal of the complaint for unfair competition. The Court of Appeals for the Seventh Circuit held the single claim of the patent not infringed.

The Court of Appeals based its conclusions on *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 169 F. 2d 645, 648 (CA 7) and also on *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136. It held that:

> "In our view it is a clear case for the application of doctrine of file wrapper estoppel, which the District Court did not discuss or refer to."

The Question Presented on the Petition.

Notwithstanding the verbose statement of "questions" set forth in the petition, the only conceivable question could be whether that holding of the Court of Appeals is correct.

There is No Proper Ground for Granting a Petition for Certiorari.

There are no special or important reasons why the petition should be granted. It is a simple case of patent infringement between two private litigants. The Court of Appeals held against the petitioners on the ground of non-infringement and they are dissatisfied.

(a) The holding is in accord with the decisions of this Court, in fact the Court of Appeals relied on and quoted from the law as enunciated by this Court.

(b) There is no conflict between Courts of Appeal. The patent was never passed on in any other case.

(c) There is no important question of Federal Law which has not been settled; the law as to file wrapper estoppel has been settled over and over again by many decisions and there is no disagreement about it.

(d) The Court of Appeals did not depart from the accepted and usual course in this case; it acted strictly in accordance with the usual course.

Petitioners contend that because the Trial Court found infringement it must necessarily have considered the defense of file wrapper estoppel. Aside from the fact that the conclusion is entirely unsound, it is of no consequence because the defense of file wrapper estoppel is a matter of law and not of fact. The only facts having to do with the defense are found in the file wrapper, which is a written instrument and can be interpreted as well by the Court of Appeals as by the District Court. Therefore, even if the District Court had passed on this defense, the Court of Appeals had no choice but to review the matter and come to its own conclusions in regard to the validity of the defense.

Conclusion.

This case presents no conflict of opinion other than the conflict which always exists when an Appellate Court concludes that the Trial Court was mistaken in finding infringement of a patent. The case is invested with no public interest. No important question of law is involved. There has been no departure from established principles of review applicable to patent infringement suits. The petition should be denied.

Respectfully submitted,

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BURGESS, RYAN & HICKS,
Counsel for Respondent.

Dated: March 16, 1956.